BOK CHEK THOU & ANOR

v.

LOW SWEE BOON & ANOR

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL REVISION NO: 13-1-1998]
12 AUGUST 1998

CIVIL PROCEDURE: *Contempt of court - Criminal contempt in civil proceeding - Perjury - Whether perjury per se can attract contempt proceedings - Meaning of contempt of court - Whether there was contempt in the face of the court - Proper procedures in contempt proceedings - Whether procedures adhered to - Whether contemnors given opportunity to reply to charges - Whether contemnor has right to legal representation*

CRIMINAL PROCEDURE: *Contempt of court - Criminal contempt in civil proceeding - Perjury - Whether perjury per se can attract contempt proceedings - Meaning of contempt of court - Whether there was contempt in the face of the court - Proper procedures in contempt proceedings - Whether procedures adhered to - Whether contemnors given opportunity to reply to charges - Whether contemnor has right to legal representation*

In the midst of a trial at the Sessions Court to determine quantum of damages, both plaintiffs were found to be guilty of contempt of court. This conclusion was reached at by the judge as a result of his finding that both plaintiffs had given false testimony. The second plaintiff initially gave evidence that he was working with the first plaintiff while the first plaintiff alleged that he paid the second plaintiff's EPF contributions. It was subsequently discovered, however, that not only were the EPF contributions never made, but the second plaintiff was also never employed by the first plaintiff. Upon this discovery by the court, both plaintiffs admitted to having lied in court.

The High Court, exercising its revisionary powers, called up this case to determine whether any injustice had occurred in the course of the contempt trial. The issues for consideration were: (i) whether there was any contempt in the face of the court pursuant to the facts; (ii) whether the procedures necessary in contempt proceedings were sufficiently adhered to; and (iii) whether the contemnors were given the opportunity to reply to the respective charges.

Held:

[1] A contempt of court is an act calculated to interfere with the due administration of justice, and may be civil or criminal in nature. For civil, it consists of a disobedience to an order of the court, in circumstances where the disobedience is principally a matter which affects the parties to the case. As for criminal contempt, it is an act that is meant to bring the very administration of justice generally into disrepute. A criminal contempt can be committed in relation to a civil proceeding.

[2] The powers of the High Court, the Court of Appeal and the Federal Court to deal with cases of contempt are promulgated in art. 126 of the Federal Constitution and s. 13 of the Courts of Judicature Act 1964. The power to punish a contemnor is defined in O. 52 rr. 1 & 4 of the Rules of the High Court 1980. As for the subordinate courts, the relevant provision will be that of paragraph 26 of the Third Schedule to the Subordinate Courts Act 1948.

[3] In spite of there being no provision in the Subordinate Court Rules 1980 regarding the exercise of this power, it is established law that such court may effectively exercise this power. This is possible so long as the contemnor is given the opportunity of being heard and the proceedings do follow the procedural tenets of natural justice, with the exception of the necessity of the case being heard by the very judge who had cognisance of that contempt.

[4] To fall within the purview of contempt of court based on perjury, a witness not only must have perjured but must also have intended to obstruct or frustrate the administration of justice. In this case, the witnesses had admitted committing those offences, without care to truth and justice. Both witnesses had intended deliberately to obstruct or frustrate the administration of justice and their acts were conscious, deliberate and contumacious.

[5] This was a summary proceeding which required instant action. So as to prevent the degeneration of the administration of justice, courts should not generally follow the "right of legal representation" rule. In this case however, in spite of courts' unsympathetic attitude regarding a contemnor's right to legal representation, not only were the plaintiffs legally represented at the lower court, but they were also sufficiently advised.

Obiter:

The High Court is entitled to exercise its powers of revision whenever it detects that a material error or defect in law or procedure had occurred, or where there has been a misconception or misreading of evidence, or where there has been a failure to exercise or wrong exercise of jurisdiction, or where the facts admitted or proved do not disclose any offence, or where judicial discretion was exercised arbitrarily or perversely. A calling of a case for revision is not to be interpreted as a desire to interfere and intimidate judicial officers from carrying out their duties effectively or to undermine them. This is so as judicial officers should be fearless when the situation warrants it, so as to prevent justice from being obstructed or denigrated.

[Order accordingly.]

Case(s) referred to:

A-G v. Clough [1963] 1 QB 773 ***(cit)***
A-G v. Foster [1963] 2 QB 477 ***(cit)***
Apted v. Apted V Bliss [1930] P 246 ***(refd)***
Balogh v. St Albans Crown Court [1974] 3 WLR 314/319 ***(cit)***
Caetano Colaco v. Joao Rodriques [1966] AIR Goa 32 ***(cit)***
Chang Hang Kiu & Ors v. Sir Francis T Piggot & Anor [1909] AC 312 ***(cit)***
Cheah Cheng Hoc v. PP [1986] 1 CLJ 169 ***(refd)***
Coward v. Stapleton [1953] 90 CLR 573 ***(foll)***
Gamalath Ralalage Daniel Appuhamy v. The Queen [1963] AC 474 ***(cit)***
In Re Pollard [1868] LR 2 PC 106 ***(refd)***
Jaginder Singh & Ors v. A-G [1983] 1 CLJ 69 ***(foll)***
James John Lewis [1993] 96 Cr App Rep 412 ***(cit)***
Joseph Orakwue Izuora v. The Queen [1953] AC 327 ***(cit)***
Karam Singh v. PP [1975] 1 MLJ 229 ***(cit)***
Kevin John Moran [1985] 81 Cr App Rep 51 ***(refd)***
Morris v. Crown Office [1970] 2 QB 114 ***(refd)***
PP v. Lee Ah Keh & Ors [1968] 1 MLJ 22 ***(cit)***
PP v. Seeralan [1985] 2 MLJ 30 ***(cit)***
Qureshi v. Qureshi [1971] 2 WLR 518 ***(refd)***
R v. Montgomery [1995] 2 All ER 28 ***(refd)***
R v. Newbury Justices, ex p Pont & Ors [1983] Cr App Rep 255 ***(cit)***
Re Kumaraendran, An Advocate & Solicitor [1975] 2 MLJ 45 ***(cit)***
Re Pollard [1868] LR 2 PC 106 ***(cit)***
Secretary Of State For Defence & Anor v. Guardian Newspaper Ltd [1985] 1 AC 339 ***(refd)***
Sheo Mandil v. Emperor [1939] AIR Allahabad 5 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 126
Federal Constitution, art. 126
Courts of Judicature Act 1964, s. 13

Rules of the High Court 1980, O. 52 rr. 1, 4
Subordinate Courts Act 1948, para 26, Third Schedule

Contempt of Court Act 1981 [UK], s. 10

For the plaintiffs - Hillary D'Cruz; M/s Raghbir Singh Norizan & Co

Reported by S Dharmendran

JUDGMENT

Suriyadi Halim Omar J:

On 28 May 1998 the hearing for this guaman sivil commenced before the Sessions Court judge, with the issue of liability having been agreed upon by parties beforehand, in that the plaintiffs were liable at 10% and the defendants at 90%. What were left for the judge's consideration were the issues of quantum of damages for the general damages and the loss of earnings of the 2nd plaintiff. When the trial began, the first witness for the plaintiffs' case was the 2nd plaintiff (PW1) himself, followed by the 1st plaintiff (PW2). In the midst of the hearing, relating to the whereabouts of the 2nd plaintiff's place of employment, the learned Sessions Court judge concluded that both plaintiffs had committed contempt of court.

From the notes of proceedings, I could gauge that PW1 had admitted initially of working with the 1st plaintiff (PW2) as a mechanic, gainfully employed to repair industrial refrigerators at the time of the accident. He claimed to earn RM1,200 per month. After the 2nd plaintiff (PW1) had testified, the 1st plaintiff's testimony followed, admitting having paid EPF, inclusive of overtime pay, for his employees. During the cross-examination, the 1st plaintiff alleged that he paid the 2nd plaintiff's EPF, from May 1995 until March 1996. The defendants later called DW1, one Azmil bin Idris, who testified that the 1st plaintiff never paid any EPF for the 2nd plaintiff. Having heard DW1, and realising that PW1 and PW2's evidence were at variance with that of the testimony of the EPF's officer, and may have perjured, the learned Sessions Court Judge adjourned the case. This adjournment was solely for the purpose of enabling the 1st plaintiff to produce the receipts of the supposed EPF payments made by his company. When the 1st plaintiff (P142) was recalled, he did an immediate U-turn and confessed that not only did he make no payments for the 2nd plaintiff, but also denied that he had employed the latter as one of his employees. The 2nd plaintiff similarly turned turtle and corroborated this confession.

Having heard these confessions, and as it was lunch hour, the case was adjourned until 2.30pm for purposes of preparing the contempt proceedings. At that appointed hour, charges were respectively read to both the plaintiffs.

The charges were separately read as it would be against the law to lump these contemnors together. The Malaysian legal and judicial system does not recognise group punishment, hence the necessity of separate charges, with their identities established (*Public Prosecutor v. Lee Ah Keh & Ors* [1968] 1 MLJ 22). The charge against the 1st plaintiff reads:

> That you Bok Chek Thou in examination-in-chief stated that you made EPF payments in respect of Shahri bin Ahmad for the period from May 1995 till March 1996 and when the EPF records produced showed otherwise, you admitted that no EPF payments were made by you or your company named Yong Tuck Refrigerator Trading and you have therefore made contradictory statements in the witness box, in utter disregard for the truth, calculated to interfere with the due administration of justice.

As against the 2nd plaintiff it reads:

> That you Shahri bin Ahmad in examination-in-chief stated that you worked with Syarikat Yong Tuck Refrigerator commencing four months prior to the accident on 26.11.95 and that your working hours were from 8.30 am till 9.00 pm and when the EPF records produced showed otherwise, you then admitted that you only worked part-time with said company and that you were in fact in the employment of Insulation Wall Industries Johor Bahru until October 1995 and you have therefore made contradictory statements in the witness box, in utter disregard for the truth, calculated to interfere with the due administration of justice.

Matters were made easy when both the contemnors admitted to having lied in court. The 1st plaintiff admitted that he deliberately lied as he wanted to help the 2nd plaintiff who was a poor man; the 2nd plaintiff merely admitted but without giving any reasons as to why he lied though he was in collaboration with the 1st plaintiff. Both were respectively found guilty, and fined RM300 each, in default one week's jail.

This matter came to my attention through an indirect source, and pursuant to my revisionary powers, I called up the file to determine whether any injustice had occurred in the course of the contempt trial. The High Court can exercise its revisionary powers even if the information has come from a total stranger to the proceedings, more so if the proceeding was void for illegality. I am entitled to exercise my powers whenever I detect that a material error or defect in law or procedure had occurred, misconception or misreading of evidence, failure to exercise or wrong exercise of jurisdiction, or where the facts admitted or proved do not disclose any offence, or where judicial discretion was exercised arbitrarily or perversely (*Caetano Colaco v. Joao Rodrigues* [1966] AIR Goa 32). It must be understood that any calling of a case for revision by a judge, must never be interpreted as a desire to interfere and intimidate judicial officers from carrying out their duties effectively, or to undermine

them. This is so as judicial officers should be fearless when the situation warrants it, so as to prevent justice from being obstructed or denigrated (*Karam Singh v. Public Prosecutor* [1975] 1 MLJ 229). I was personally conscious that I should avoid sending out wrong signals, and at the same time inadvertently encourage witnesses and counsels to be contemptuous of the powers of these officers. It was never my desire to declare open season for potential contemnors.

A contempt of court is an act calculated to interfere with the due administration of justice, and may be civil or criminal in nature. For civil, it consists of a disobedience to an order of the court, in circumstances where the disobedience is principally a matter which affects the parties to the case. As for criminal contempt, it is an act that is meant to bring the very administration of justice generally into disrepute. As in this case, a criminal contempt can be committed in relation to a civil proceeding.

It is trite that in contempt cases the power to punish the contemnors are summary, and contrary to natural justice, as the judge is the same judge, jury and witness. He is the witness as he was present when the contempt occurred; he, like that hypothetical juror decides on the facts which he saw and perceived, and he imposes a sentence if necessary in a summary manner (*Re Kumaraendran, An Advocate & Solicitor* [1975] 2 MLJ 45; *Balogh v. St. Albans Crown Court* [1974] 3 WLR 314/319). To wind up this paragraph, May LJ in *R. v. Newbury Justices, Ex parte Pont and Others* [1983] Cr. App. Rep 255, at p. 259 endorsed the subsequent statements from the case of *Moris v. Crown Office* [1970] 2 QB 114, which reads:

> ... The sole purpose of proceedings for contempt is to give our courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented.

To summarise, the disposition of contempt charges which is summary in nature, may be justified by the need to remove as quickly as possible any impediments or obstructions to the administration of justice as observed by the presiding judge. He is to nip and suppress the problem at the earliest of stages.

The powers of the High Court, Court of Appeal and the Federal Court to deal with cases of contempt, are promulgated in art. 126 of the Federal Constitution, and s. 13 of the Courts of Judicature Act 1964. Such power to punish a contemnor is clearly defined under O. 52 r. 1 and r. 4 of the Rules of the High Court 1980. As for the subordinate courts, the relevant provision will be that of para. 26 of the Third Schedule to the Subordinate Courts Act 1948, which reads:

> Power to take cognizance of any contempt of court and to award punishment for the same, not exceeding, in the case of a Sessions Court, a fine of three hundred ringgit or imprisonment for six weeks, in the case of a Magistrates' Court presided over by a First Class Magistrate, a fine of one hundred and fifty ringgit or imprisonment for three weeks, and in the case of a Magistrates' Court presided over by a Second Class Magistrate, a fine of fifty ringgit or imprisonment for one week, to such extent and in such manner as may be prescribed by rules of court. If the contempt of court is punishable as an offence under the Penal Code, the court may, in lieu of taking cognizance thereof, authorize a prosecution.

In spite of there being no provision in the Subordinate Court Rules 1980, regarding the exercise of this power, it is established law that a court may effectively exercise that power. This is possible so long as the contemnor is given the opportunity of being heard, and the proceedings do follow the procedural tenets of natural justice, with the exception of the necessity of the case being heard by the very judge who had cognisance of that contempt (*Public Prosecutor v. Seeralan* [1985] 2 MLJ 30). In *Qureshi v. Qureshi* [1971] 2 WLR 518 Sir Jocelyn Simon P. at p. 535 had occasion to say:

> But in my judgment, where a legislative authority by an enactment setting up a tribunal or other body envisages rules to be made governing the procedure of such tribunal or body, and no such rules are made, the tribunal or body is not necessarily thereby disabled from performing its function. In such case the tribunal or body acts effectively provided it acts in accordance with natural justice and to promote the objective with which it was set up, and possibly by analogy with the rules of procedure prescribed for comparable tribunals or bodies.

Adverting to, and disseminating this relevant para. 26, the subordinate courts may act on any contempt of court, inclusive of any form of contempt in the face of the court (or contempt *ex facie* the court). The well established categories of criminal contempt are many, but for purposes of this case, I was only interested in "contempt in the face of the court", briefly to mean a contempt witnessed by and or within the cognisance of the presiding judge. He may thenceforth summarily deal with it. Abdoolcader J in *Re Kumaraendran (supra)* at p. 47, pertaining this phrase, had this to say:

> Contempt in the face of the court has been, in my view, aptly defined by Laskin J., in his dissenting judgment in the Canadian Supreme Court case of *McKeown v. The King* when he said:
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> > Contempt in the face of the court is, in my view, distinguished from contempt not in its face on the footing that all the circumstances are in the personal knowledge of the court. The presiding judge can then deal summarily with the matter without the embarrassment of having to be a witness to issues of fact which may be in dispute because of events occurring outside.

Lord Denning M.R., in *Balogh v. St Albans Crown Court*, said:

> So 'contempt in the face of the court' is the same as 'contempt which the court can punish of its own motion'. It really means 'contempt in the cognisance of the court'.

The relevant questions that required consideration by me were:

1. whether there was any contempt in the face of the court pursuant to the facts;

2. whether the procedures necessary in a contempt proceeding were sufficiently adhered to here; and

3. whether the contemnors were given the opportunity to reply to the respective charges.

Having perused the documents I was satisfied that all the three relevant questions must be answered in the positive. The reasons become clearer, if the poser of whether lying in court is sufficient to be construed as an act equivalent to contempt of court, is resolved first. I begin by citing cases where witnesses refused to testify to legitimate questions. Lord Diplock in *Secretary Of State For Defence And Another v. Guardian Newspapers Ltd.* [1985] 1 AC 339, when settling the question of construction of s. 10 of the Contempt of Court Act 1981, had this to say:

> ... it applies also to disclosure in response to a question put to a witness at the trial where a refusal to answer the question if ordered to by the judge to do so would constitute a contempt committed in the face of the court and thus a criminal contempt.

In *R. v. Montgomery* [1995] 2 All ER 28/32, the court there discussed the suitability of a committal order in a contempt proceeding, as against a witness similarly refusing to testify in a case. This uncompromising attitude may be watered down in certain circumstances, eg, when a witness refuses to give evidence for fear of reprisal, when an answer to a question may tend to expose him to a criminal charge, communications between husband and wife during the marriage, and communications between a client and his lawyer except for criminal proceedings etc. (*James John Lewis* [1993] 96 Cr App Rep 412, CA; s. 126 of the Evidence Act, though not for communications between the press and the informants (*Attorney-General v. Clough* [1963] 1QB 773; *Attorney-General v. Mulholland. Attorney-General v. Foster* [1963] 2QB 477)). Similarly in a local case of *Jaginder Singh & Ors. v. Attorney-General (infra)*, Raja Azlan Shah (as His Lordship then was), when discussing C*oward v. Stapleton* [1953] 90 CLR 573, endorsed these views:

> It is only in a strictly limited class of cases that a witness can properly be convicted of refusing to answer a question which he has purported to answer ... that in fact the witness is declining to make any reply which can be properly called an answer to the question. There must be a manifestation in some form of an intention on the part of the witness not to give a real answer.

Now I briefly touch on cases where witnesses have deliberately perjured in court. The president in the case of *Apted v. Apted V Bliss* [1930] P 246 at 263 had occasion to say:

> Parke B. in an opinion delivered in the House of Lords in *Miller v. Knox* described commitment for contempt as "a summary remedy for obstructions in the course of Justice" In a ca*se of Smith v. Bond* Alderson B. is reported as saying: "Persons giving false testimony in Court are frequently committed for contempt." At a comparatively recent date a member of the Bar who was party to the reading to the Court of a false affidavit was held guilty of contempt and imprisoned: *Linewood v. Andrews and Moore.*

Lee Hun Hoe CJ (Borneo) in *Cheah Cheng Hoc v. Public Prosecutor* [1986] 1 MLJ 299 at p. 300 regarding this poser had this to say:

> The court has power to punish as contempt any misuse of the court's process, e.g. forging or altering of court documents or other deceits of the kind or deceiving the court by deliberately suppressing a fact or giving false facts. (emphasis mine)

On the other hand, a few years earlier, in the case of *Jaginder Singh & Ors. v. Attorney-General* [1983] 1 MLJ 71, Raja Azlan Shah Ag. LP (as he then was) at p. 73, added a rider by saying:

> ... False testimony, together with a refusal to answer questions amounts to an obstruction of the administration of justice which is punishable as a contempt; *false testimony, without more, does not*. (emphasis mine)

His Lordship opined that a false testimony without more, will result in that party or witness being liable to prosecution for perjury, whilst for contempt of court that false testimony must be supplemented by the intention to obstruct or frustrate the administration of justice. In other words, the supplementary factor must be present. By the enunciation of the principles laid down in *Coward v. Stapleton,* and endorsed by Raja Azlan Shah Ag. LP, it is now established that, to fall within the purview of contempt of court based on perjury, a witness not only must have perjured, but had intended to obstruct or frustrate the administration of justice. In the current case, clearly the witnesses had admitted committing those offences with the intention of helping the 2nd plaintiff, without care to truth and justice.

Factually it was incontrovertible that the 1st plaintiff paid no EPF for the 2nd plaintiff, nor did the latter work full time with the 1st plaintiff. At the very inception of the hearing, both parties had intended deliberately to obstruct or frustrate the administration of justice, found by the learned sessions court judge to be conscious, deliberate and a contumacious act. To wind up this matter, if a refusal to reply to a legitimate question may attract contempt proceedings, as highlighted by the persuasive authorities, then a perjury laced by an intention to obstruct and frustrate the administration of justice, surely could not be construed otherwise.

Procedurally, a magistrate or a Sessions Court judge, prior to finding a person guilty of contempt of court, may be on safe grounds if these tabulated guidelines were to be adhered to, *viz.:*

(i) to have cognisance of, or to be personally conscious and aware of the conduct, remarks, act of refusal to answer to questions and/or evidence of the contemnor;

(ii) to record that witnessed conduct, remarks, act of refusal to answer and/or evidence of that intended contemnor. These notations will be a point of reference subsequently when the intended contemnor is required to explain the above "contemptuous" acts or statements. It must be borne in mind that these are mere guidelines as it is not possible to particularise all the acts or statements which can or cannot constitute contempt in the face of the court (*Joseph Orakwue Izuora v. The Queen* [1953] AC 327/336);

(iii) in the event of any comparative evidence being made available, to show that perjury had occured, such comparative evidence are to be recorded;

(iv) any apparent evinced intentions to obstruct and frustrate the administration of justice connected to that perjury are to be minuted;

(v) having concluded that a probable offence of contempt had been committed, the contemnor is to be informed of the court's desire to pursue a contempt proceeding;

(vi) when the contempt is committed in the view and presence of the judge, he is to order the offender to be detained by the police, pending the commencement of the contempt proceedings *(Public Prosecutor v. Lee Ah Keh & Ors (supra));*

(vii) that the proceedings be adjourned for a short while, if necessary, for a "cooling off period" or for purposes of permitting the judge to prepare the charge (*In Re Pollard* [1868] LR 2 PC 106/120)

(viii) when the proceeding commences, the charge is read out to the intended contemnor, with it having sufficient particularities, especially the perjured testimony, together with the evinced intention to frustrate or obstruct the administration of justice. If the charge is based on conduct, remarks or refusal to answer questions witnessed by the judge or which he has cognisance of, then those appropriate particulars are to be specified;

(ix) as this is a criminal proceeding *(Public Prosecutor v. Lee Ah Keh & Ors. (supra))*, the contemnor must be given the opportunity to answer the charge. This conferment of such an opportunity is essential, especially when a committal may be a possible sentence (*Chang Hang Kiu And Others v. Sir Francis T. Piggot And Another* [1909] AC 312; *Gamalath Ralalage Daniel Appuhamy v. The Queen* [1963] AC 474).

This issue of opportunity to reply invariably brings forth the consideration of the concept of the necessity of representation for the contemnor. One must bear in mind that as this is a summary proceeding, which requires instant action, so as to prevent the degeneration of the administration of justice, courts should not rigidly follow the time honoured, "right of legal representation". In the case of *Kevin John Moran* [1985] 81 Cr. App Rep 51, Lawton L.J. rejected the view that a contemnor had a right to legal advice. The strong terms he opined:

> Sometimes situations arise in court when the judge has to act quickly and to pass such sentence as he thinks appropriate at once; so there cannot be any right to legal advice. Justice does not require a contemnor in the face of the court to have a right to legal advice.

(For comparison purposes, see also the case of *Sheo Mandil v. Emperor* [1939] AIR. Allahabad 5, where so long as the accused was in contempt the applicant will not have the right of audience). In relation to this current case, suffice for me to clarify that in spite of the court's unsympathetic attitude regarding a contemnor's right to legal representation, not only was he legally represented at the lower court, but was sufficiently advised. On that note I will not proceed further on this point; and

(x) having given that opportunity to reply, and if admission is elicited, the court may proceed with the sentencing. If he has adequately explained his perjury/remarks/conduct, and/or reason for refusing to answer to questions, then he may be dealt with appropriately or even entitled to an outright acquittal (*Public Prosecutor v. Seeralan (supra)*. Otherwise the sentencing procedure follows.

Having perused the notes of proceedings, I was absolutely satisfied that not only did I find the testimonies of the contemnors false, but clearly intended to frustrate or obstruct the administration of justice. The procedure undertaken by the learned Sessions Court judge did not depart in any way from the guidelines, that I have tabulated above. The messy defences or explanations were mercifully avoided when the contemnors freely confessed the perjury, coupled with their evinced intentions surrounding those perjured testimonies. It was on the above grounds that I refrained from disturbing the decision of the learned Sessions Court judge.